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Supreme Court, U.S.
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No. 98-1511

IN THE

Supreme Court of the United States

October Term, 1998

CITY OF AUBURN, a municipal corporation of the State of Washington,

Petitioner,

v.

THE UNITED STATES GOVERNMENT and THE SURFACE TRANSPORTATION BOARD, an agency of the United States Government; KING COUNTY, a Washington municipal corporation; BURLINGTON NORTHERN SANTA FE CORPORATION, a Delaware corporation; BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation; BURLINGTON NORTHERN SANTA FE ACQUISITION, INC.; and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Ninth Circuit's method of statutory interpretation correct where the Court relied on the plain language and statutory framework of the Interstate Commerce Commission Termination Act of 1995 (the "ICCTA" or the "ACT") to hold that the Act preempts state and local permitting laws that have the capacity to deny or impede a railroad's ability to engage in a federally-licensed activity, a decision consistent with every other federal court's interpretation of the broad preemptive effect of the Act as well as the long recognized need to regulate railroad operations at the federal level?

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Respondent, Burlington Northern Santa Fe Corporation and related entities ("BNSF") accepts petitioner's presentation of the List of Parties, the Opinion Below, the Statement of Jurisdiction and the Statutes Involved.

STATEMENT OF THE CASE

1. The Stampede Pass rail line improvement project.

The Stampede Pass rail line was first put in service in 1888. ER Tab 1, Ex. A, p. 3.[1] The line became one of three major east-west rail lines linking ports and other communities throughout Western Washington to the rest of the country. *Id.* *See* ER Tab 10, p. 1. Facing decreasing demand for rail services, BNSF decided to take the rail line out of general service in 1983. ER Tab 1, Ex. A, p. 3. In 1986, BNSF sold the eastern portion of the rail line (a 151 mile segment between Cle Elum and Pasco, Washington) to the Washington Central Railroad Company. ER Tab 10, p. 1. From 1983 until 1996, the Stampede Pass line was only in limited use. *Id.*

Due to increasing demand for rail transportation in the mid-1990's, BNSF decided to put the Stampede Pass line back in regular service as a main line. ER Tab 1, Ex. A, p. 3; ER Tab 10, p. 1. In 1996, BNSF sought approval from the Surface Transportation Board ("STB") "to reacquire the line from Washington Central and re-establish the route as a third main rail line in the Pacific Northwest."

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[1] References are to the record before the Ninth Circuit Court of Appeals.

City of Auburn v. United States, et. al., 154 F.3d 1025, 1028 (9th Cir. 1998). The STB had been created pursuant to the ICCTA and was granted jurisdiction over certain interstate rail functions and proceedings.

After twelve years of limited use, the Stampede Pass rail line needed modernization, repairs and improvements. ER Tab 1, Ex. A, pp. 2-3 & Ex. C. "Burlington proposed repairs and improvements on the line, which included replacement of track sidings and snow sheds, tunnel improvements, and communication towers." *Auburn*, 154 F.3d at 1028. None of the Stampede Pass line work was performed in Auburn. The closest work to Auburn was done approximately fifteen miles east of Auburn at Kanaskat. *See* ER Tab 1, Ex. A (Figure 1).

BNSF initially submitted permit applications for the project to King County and Kittitas County, Washington. During the permit review process, however, BNSF contended that local environmental review was precluded by federal regulation. *Auburn*, 154 F.3d at 1028.

In response, in May 1996, King County asked the STB for an informal opinion as to whether the ICCTA preempted the County's authority to evaluate or condition BNSF's operations of the Stampede Pass line within the County through the process of issuing grading, building and conditional use permits. *Id.* Auburn submitted a letter to provide the STB with its "input into the situation." ER Tab A, Ex. F. In its letter, Auburn explained its fear to be from traffic impacts and informed the STB of its intent to stop the re-opening of the rail line if its demands

were not met: "We do not appreciate having to devote substantial effort to thwarting the Railroad's plans but their actions leave little other choice." *Id.* Auburn did not assert, and has never asserted, that it has any authority to directly regulate any aspect of the Stampede Pass line improvements.

In June 1996, the STB Secretary issued an informal opinion that the ICCTA preempted King County's permitting process. ER Tab A, Ex. C. The Secretary noted that the County, if allowed to subject BNSF to the permitting process, could deny BNSF authority to renovate the Stampede Pass line thereby preventing BNSF from carrying traffic on the line. *Id.* at pp. 5-6. The Secretary concluded that state and local permitting interfered with the federal licensed program and unreasonably burdened interstate commerce. *Id.*

Based on the STB's decision, BNSF withdrew its pending permit applications with King County and informed the County that it would voluntarily mitigate construction-related activities. ER Tab A ¶ 26 & Ex. A & B. BNSF worked closely with state and local governments to address the substantive concerns that would have been considered in their permit requirements. ER Tab 3, p. 1. BNSF met with permitting jurisdictions to explain the planned construction activities and solicit feedback. In some instances, state and local jurisdictions preferred to coordinate with BNSF through an informal non-binding permit process. *Id.* In accord with this process, BNSF incorporated Best Management Practices in its grading activities and designed its maintenance of way facilities to meet all Uniform

Building Code and state requirements. *Id.* Auburn has not raised any specific objection to BNSF's construction or its environmental consequences.

2. STB formal opinion on state and local permitting.

In August 1996, King County requested that the STB review the informal opinion and issue a formal determination as to whether the ICCTA preempts King County's authority to evaluate or condition BNSF's Stampede Pass improvements. ER Tab A, Ex. H. Specifically, King County requested that the STB issue a declaratory order "identifying whether and to what extent King County is preempted by the ICC Termination Act from requiring permits for proposed Stampede Pass improvements." ER Tab A, ¶ 3.1. On September 17, 1996, "Auburn wrote to the STB and requested designation as a party of record in the declaratory proceeding". *Auburn*, 154 F.3d at 1028. On September 25, 1996, the STB issued its Decision in *King County* and ruled that the ICCTA preempts the County's permitting of construction relating to the re-opening of Stampede Pass.

The STB also denied Auburn's request to intervene. ER Tab E, p. 1., n. 2. The STB did, however, invite Auburn to submit its own petition for a declaratory order in a separate docket. *Id.*

3. Auburn's petition to the STB.

Auburn took the STB's advice. On October 11, 1996, Auburn filed a Petition for Declaratory Order with the STB. ER Tab 1.[2] On July 1, 1997, the STB issued its declaratory order in *City of Auburn* and reaffirmed its determination in *King County* that "a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted." ER Tab 10, p. 5. The STB did not declare that state and local authorities were completely barred from regulating all consequences of BNSF's activities. Rather, the STB stated that "there are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution." ER Tab 10, p. 7. What is preempted, according to the STB, is the local permitting process "where such process could be used to frustrate or defeat an activity that is regulated at the Federal level." ER Tab 10, p. 7. The STB noted that Auburn's "admitted goal" is to "constrain BN's train operations . . . in order to force BN to fund infrastructure improvements related to the line." *Id.*

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[2] In addition, Auburn filed petition for review of the STB's decision in *King County* with the Ninth Circuit. On March 26, 1997, the Ninth Circuit granted BNSF's motion to dismiss, in part, and wrote that "[b]ecause Auburn was not a party to the proceedings below, it lacks standing to obtain review on the merits of those proceedings." "This court may, however, have jurisdiction to review the Surface Transportation Board's denial of the City's motion to intervene." Thereafter, the Ninth Circuit determined the issue to be moot. *Auburn*, 154 F.3d at 1028, n.5.

4. The STB's approval of BNSF's re-opening of the Stampede Pass rail line as a main line.

In the meantime, BNSF was pursuing its "petition for approval under 49 U.S.C. §§ 11323-25 to reacquire and conduct improvements on the Stampede Pass rail line" from the STB. *Auburn*, 154 F.3d at 1028. In its petition, BNSF noted that reestablishing the Stampede Pass route would enable the BNSF system to improve capacity and reduce congestion in the Pacific Northwest area. ER Tab DD, p. 4. The reopening of the route would increase routing and service options to shippers, improve transit times and car supply, and result in a more efficient operation. *Id.* This increased efficiency would enhance competition for transportation into and out of the Pacific Northwest. *Id.* at p. 4.

As part of this proceeding, the STB conducted an environmental review under the National Environmental Protection Act ("NEPA") of BNSF's proposed operation of the entire Stampede Pass rail line. ER Tab 10, p. 4, n. 11; ER Tab DD, p. 9. The STB's environmental staff prepared an Environmental Assessment ("EA"). "The EA considered impacts on safety, energy, air quality, noise and vibration, land use, water, biological resources and cultural resources." *Id.* at p. 10. Comments were solicited and received on the EA. "After comments were received, a post -EA was prepared to address the concerns raised. The EA and post-EA concluded [BNSF's] proposal would not have a significant environmental impact, if certain mitigation measures were implemented." *Auburn*, 154 F.3d at 1029.

The EA and post-EA also identified the environmental benefits of reopening the line.

Specifically, numerous environmental benefits of the proposal to re-open Stampede Pass were identified:

> (1) Reduction of 226,260 train miles traveled per year from more efficient routing of trains from the Cascade and Columbia River routes to the Cle Elum to Pasco and the Stampede Pass lines.
>
> (2) Reduction of 3,468,970,900 annual gross ton miles from more efficient routing.
>
> (3) Fuel savings of 4.6 million gallons per year.
>
> (4) Reduction in emissions of sulfur dioxide (84.9 tones), nitrogen oxides (1172 tons), carbon monoxide (157 tons), particulate matter (25.4 tons), and hydrocarbons (50.3).
>
> (5) Decrease in noise exposure along the Cascade and Columbia River routes.
>
> (6) Reduction in the potential for accidents and spills.

ER Tab HH, p. 6. The EA considered Auburn's demand for grade separations to address traffic concerns, but concluded that the "large financial burden on the railroad" of such grade separations was not warranted. ER Tab HH, p. 7. 13 separate mitigation measures were recommended. *See id.* at pp. 22-26. These measures included mitigating potential impacts based on an increase of train traffic through cities such as Auburn along the Stampede Pass rail line.

In October 1996, the STB approved the proposed acquisition and BNSF's operation of Washington Central's segment of the Stampede Pass rail line. ER Tab 10, p. 4. The STB concluded that "the public benefits from the transaction are substantial." ER Tab DD, p. 8. The STB continued:

> [BNSF] would realize $15.24 million in annual savings from the rerouting of traffic over the shorter Stampede Pass route. There are also significant unquantified benefits. By reopening the Stampede Pass route, [BNSF] will relieve capacity constraints on the Cascade route and the Columbia River route.

Id. The STB also adopted the post-EA conclusions and mitigation measures. *Id.* at p. 10.

5. Auburn's appeal to the Ninth Circuit.

Auburn filed its petition for review of STB's decision to the Ninth Circuit in *City of Auburn* on August 15, 1997.[3] A unanimous panel affirmed the STB decision after reviewing the plain language and the statutory framework of the ICCTA. The panel unanimously rejected Auburn's petition for rehearing. Auburn's request for a rehearing *en banc* was submitted to the full Ninth Circuit Court of Appeals. No active judge requested a vote to hear the matter *en banc* and Auburn's request was denied.

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[3] Although King County had intervened in *City of Auburn*, King County did not join in Auburn's petition for review before the Ninth Circuit or file one of its own.

REASONS FOR DENYING THE WRIT

In a well-reasoned decision, the Ninth Circuit Court of Appeals determined that "State and local **permitting** laws regarding railroad operations are preempted by the plain language of the ICCTA, and the statutory framework surrounding it." *Auburn*, 154 F. 3d at 1033 (emphasis added). The Ninth Circuit's decision is not in conflict with any decision of any other Circuit or of any other court, for that matter. To the contrary, the decision is consistent with and reflects the long history of federal preemption of state and local regulation of the railroad industry. Moreover, the decision is consistent with non-ICCTA cases recognizing the authority of Congress to preempt state and local environmental permitting regulation affecting interstate commerce. The Ninth Circuit utilized long accepted methods of statutory interpretation to support its decision. Finally, the Ninth Circuit's decision is a limited finding of preemption, not a wholesale dismissal of all state and local police powers as asserted by Auburn. Supreme Court Rule 10 provides that a petition for a writ of certiorari can be granted "only for compelling reasons." Auburn presents none in this case. Auburn's petition should be denied.

I THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY OTHER COURT DECISION

Petitioner concedes that section (a) of Rule 10 does not apply to its petition because no Circuit Court has issued a decision in conflict with the Ninth Circuit's ruling. In fact, the Ninth Circuit's decision is consistent with the several United States District Courts that have

considered the issue. As the Ninth Circuit noted in its decision, all "district courts that have had the opportunity to examine the question have applied federal preemption." *Auburn*, 154 F.3d at 1030. *See CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1584 (N. D. Ga. 1996) ("With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations); *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D. Mont. 1997) ("The Act reserves no area of regulation for the individual states--agency regulation or otherwise.") A conflict between Circuits can constitute a compelling reason for granting a petition for certiorari. Here, not only is there no conflict between Circuits, there is no conflict with any federal court on any level. Not a single federal court has adopted Auburn's view of the ICCTA.

II THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH OTHER CASES RECOGNIZING THE BROAD PREEMPTIVE EFFECT OF FEDERAL STATUTES REGULATING INTERSTATE COMMERCE

The Ninth Circuit's decision reflects a long history of federal preemption of state regulatory powers affecting interstate commerce generally and the railroads specifically. Numerous pre-ICCTA and post-ICCTA cases recognized the broad preemptive effect of the federal railroad statutes. *See Norfolk & W. Ry. v. American Train*

Dispatchers Ass'n, 499 U.S. 117, 127-34 (1991); *Georgia Public Service Comm'n v. CSX Transp., Inc.*, 484 S.E.2d 799 (Ga. Ct. App. 1997); *In re Burlington Northern R.R.*, 545 N.W.2d 749, 750 (Neb. 1996) ("We hold that this court lacks subject matter jurisdiction to address the matter because the [ICCTA] preempts state remedies and vests exclusive jurisdiction in the federal government for interstate rail matters affecting practices, routes, services, and facilities of rail carriers.") The Ninth Circuit's decision here is entirely consistent with these cases.

More than one hundred years ago, Congress determined that comprehensive federal regulation of the railroads was essential to protect and promote interstate commerce and adopted the Interstate Commerce Act. The overriding purpose of the Act, as amended, was to vest exclusive authority in one federal agency to govern the construction and operation of railroads:

> Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. . . . Need for effective regulation in this field had become urgent; and undoubtedly the Congress, by the provisions above referred to, intended to confer upon the commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

Transit Comm'n v. United States, 289 U.S. 121, 127-28 (1933). In the decision below, the Ninth Circuit observed that this Act was "'among the most pervasive and comprehensive of federal regulatory schemes. . . ." *Auburn*, 154 F.3d at 1029 (*quoting Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). Regulation of the interstate railroads was vested exclusively in the federal government from cradle (the initial construction and operation of a rail line) to grave (the abandonment of a rail line). *See Transit Comm'n*, 289 U.S. at 127-28 (construction and operation); *Kalo Brick*, 450 U.S. at 319-20 (abandonment).

Since the turn of the century, the Court has "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act." *Kalo Brick*, 450 U.S. at 318. For example, the Court held that the ICC's statutory authority to regulate extensions of service was exclusive and therefore stripped a similar state commission of all power to act in that area. *Transit Comm'n*, 289 U.S. at 129. *See also Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77 (1958); *Kalo Brick*, 450 U.S. at 331-32. "The common rationale of these cases is easily stated: '[There] can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.'" *Kalo Brick*, 450 U.S. at 318-19 (citation omitted). Consequently, the available case law regarding preemption

of state regulation of railroad operations is consistent with the holding of the Ninth Circuit.

Moreover, the Ninth Circuit's decision that federal law under the Commerce Clause can, where Congress so intends, preempt state and local regulations intended to protect the environment is in no way unique or particularly significant. As the Ninth Circuit correctly noted, both this Court and the Ninth Circuit previously found state and local environmental regulations preempted by other federal laws with similarly broad preemptive scope. 154 F.3d at 1031. *See California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990); *Sayles Hydro Associates v. Maughan*, 985 F.2d 451 (1990).

Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338 (9th Cir. 1992) is directly on point. In *Burbank*, the Ninth Circuit concluded that the Federal Aviation Act (49 U.S.C. § 1301 *et seq.*) preempted the City's permitting power to approve construction of runways at an airport. The City had sought the ability to impose conditions to mitigate any adverse environmental impacts of the proposed runway construction. The Court held the City's right of prior approval of such construction was preempted. *Id.* at 1340-41.

Simply put, there is nothing particularly unusual or environmentally threatening about this decision so as to make it either exceptionally important or nationally significant. Both this Court and the Circuit Courts have recognized Congress' power to preempt even state and local environmental laws to protect and foster interstate

commerce. Auburn's petition for certiorari should be denied.

III THE STB AND A UNANIMOUS PANEL OF THE NINTH CIRCUIT CORRECTLY HELD THAT THE ICCTA PREEMPTS STATE AND LOCAL PERMITTING REGULATION BASED ON THE PLAIN LANGUAGE OF THE ACT.

1. The ICCTA expanded the scope of preemption by eliminating state regulation of intrastate rail transportation.

In recent years, Congress determined that protecting and promoting railroad commerce would be best achieved by deregulating the railroad industry. "The recognition that the surface transportation industry is competitive and that few economic regulatory activities are required to maintain a balanced transportation network has led to calls for the ICC's elimination." H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 82 (1995), *reprinted in*, 1995 U.S.C.C.A.N. 793, 807-8. Accordingly, Congress adopted the ICCTA which makes this policy of deregulation explicit:

> In regulating the railroad industry, it is the policy of the United States Government--
>
> (1) To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> . . .
>
> (4) To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> . . .

> (7) To reduce regulatory barriers to entry into and exit from the industry.

49 U.S.C. § 10101. Consistent with this policy, Congress expanded the scope of federal preemption of state regulation of railroad activities. Under the Interstate Commerce Act, states could regulate intrastate rail transportation under a federal certification program. *See* 49 U.S.C. § 11501(b) (repealed 1995). Congress had specifically provided in the Interstate Commerce Act that the ICC "does not have jurisdiction . . . over (1) the transportation of passengers and property . . . entirely in a State," thus preserving state jurisdiction over wholly intrastate rail transportation. 49 U.S.C. § 10501(b)(1) (repealed 1995). Moreover, the Interstate Commerce Act expressly provided that the federal remedies provided in the Act "are *in addition* to remedies existing under another law or at common law." 49 U.S.C. § 10103 (repealed 1995) (emphasis added). The ICCTA repealed all of these provisions and even subjected intrastate rail transportation to exclusive federal regulation. *See* 49 U.S.C. § 10501(b).

2. The Ninth Circuit held that the ICCTA preempts state or local permitting regulation of BNSF's improvements to the Stampede Pass rail line.

The Ninth Circuit held that "the plain language of two sections of the ICCTA explicitly grant the STB exclusive authority over railway projects like Stampede Pass." *Auburn*, 154 F.3d at 1030. Congress accomplished the preemption of state and local regulation by replacing former 49 U.S.C. § 10501 with a new section granting

exclusive jurisdiction over *all* regulation of rail transportation to the STB:

> The jurisdiction of the Board over--
>
> (1) *transportation by rail carriers*, and the remedies provided in this part with respect to rates, classifications, rules . . . , practices, *routes*, services, and *facilities* of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located entirely in one State, is *exclusive*. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law*, . . .

49 U.S.C. § 10501(b) (emphasis added).[4] The Ninth Circuit determined that this broad exclusive jurisdictional grant to the STB included the regulation of the Stampede Pass rail line and all property

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[4] "Transportation," in turn, is broadly defined to include all property and services related to movement by rail:

> 'transportation' includes--
>
> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property*, *facility*, instrumentality, or equipment of any kind *related to the movement of passengers or property, or both, by rail*, regardless of ownership or an agreement concerning use; and
>
> (B) *services related to that movement*, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

and facilities associated with it. *Auburn*, 154 F.3d at 1031.

The Ninth Circuit also noted that the ICCTA "expressly provides that in a merger or acquisition transaction approved under 49 U.S.C. § 11323-25, '[a] rail carrier . . . participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, *including state and municipal law*, as necessary to let that rail carrier . . . hold, maintain, and operate property . . . acquired through the transaction.'" *Auburn*, 154 F.3d at 1030 (quoting 49 U.S.C. § 11321(a) (1997) (emphasis in opinion)). The Ninth Circuit went on to rely on additional language in that section which expressly states that the "authority of the Board under this subchapter is *exclusive*." *Id.*

3. The Ninth Circuit's reliance upon the plain language of the statute was proper.

Auburn's challenge to the Ninth Circuit's unremarkable conclusion that the "plain language" of a statute should control its interpretation is unconvincing. *Auburn*, 154 F.3d at 1020-30. Auburn fails to cite a single case that conflicts with this straightforward conclusion. In fact, this Court has repeatedly stated that clear and unambiguous statutory language is "conclusive". *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("the language of the statute itself must ordinarily be regarded as exclusive."); *United States v. James*, 478 U.S. 597, 604 (1986); *United States v. Gonzales*, 520 U.S. 1 (1997). As the Court held in *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983), in construing Congress'

intent, the court "must give effect to [the] plain language [of a statute] unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *See also California ex. rel. State Water Resources Bd. v. FERC*, 1877 F.2d 743, 746 (9th Cir. 1989) ("Before considering case law and legislative history, a court reviewing a statutory construction must turn to the statute itself.")

Even when portions of the legislative history of an enactment may suggest that Congress was primarily concerned with preemption of certain types of laws, the plain language of the statute prevails. *See Cipollone v. Liggett Group*, 505 U.S. 504, 521-22 (1992) ("Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities . . . the language of the Act plainly reaches beyond such enactments"). Under the plain language of the ICCTA, states are preempted from regulating "transportation by rail carriers" (49 U.S.C. § 10501(b)), which in turn is defined to include a ". . . property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail. . . ." 49 U.S.C. § 10102(9)(A). Congress did not otherwise limit the scope of preemption of state regulation. This explicit language, by its terms, precludes state and local regulation of BNSF's Stampede Pass rail line and BNSF's work in improving the line. In short, the Ninth Circuit's determination that the language at issue is plain obviating the need to examine the ICCTA's legislative history was fully in accord with applicable rules of statutory interpretation.

4. Auburn's interpretation of the ICCTA's legislative history is faulty.

Auburn's fundamental complaint about the Ninth Circuit's decision is that the Ninth Circuit failed to given sufficient weight to some of the legislative history of the ICCTA which Auburn claims suggests Congress did not mean what it said. Auburn's reading of the legislative history is, however, wrong. Moreover, Auburn's approach would turn statutory interpretation on its head requiring courts to ignore the plain language of a statute if a litigant can point to contradictory legislative history.

Auburn bases its entire argument on a misguided reading of the legislative reports accompanying the ICCTA. Auburn notes that these reports refer to the complete preemption of "State economic regulation of railroads" and then blithely assumes that Congress used the word "economic" in specific contrast to "environmental" regulation. Auburn Brief at pp. 7-10. These legislative reports provide no traction for Auburn's argument. Nowhere in the legislative reports cited by Auburn does Congress contrast "economic regulation," which is preempted, from all "environmental regulation," which is not.

Furthermore, there is nothing in the legislative history that indicates that Congress sought to preserve the states' ability to subject federally-licensed rail operations, such as rail construction, upgrading or abandonment, to state or local permit review. To the contrary, the legislative history demonstrates that the Ninth Circuit's plain reading of the statute's broad preemptive effect was correct. Congress-

intended the scope of permissible state regulation of railroads to be extremely narrow. For example, in commenting on the statute, the House Conference Report stated that "integrated into the statement of [STB] jurisdiction is the delineation of the exclusivity of Federal remedies with respect to regulation of rail transportation." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167, *reprinted in* 1995 U.S.C.C.A.N. 850, 852. Similarly, the Senate Report explains that the ICCTA "should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by this bill." S. Rep. No. 176, 104th Cong., 1st Sess. 14.

Moreover, as the Ninth Circuit correctly found, environmental regulations have economic consequences and therefore the distinction between economic and environmental regulation "blurs." *Auburn*, 154 F.2d at 1031. Environmental permitting regulations were among the remedies that Congress intended to preempt.

Furthermore, according to Congress, the *only* powers reserved to the states are their police powers *reserved by the Constitution*:

> [C]hanges are made to reflect *the direct and complete pre-emption of State economic regulation of railroads*. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of *the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system*. Although States retain the police powers *reserved by the Constitution*, the Federal scheme of economic

> regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. *Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.*

H.R. Rep. No. 104-311 at 95-96 (underline in original; emphasis added). In the House Conference Report, Congress cited laws defining criminal offenses as bribery and extortion as examples of state laws not displaced "because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." H.R. Conf. Rep. No. 104-422 at 167. Environmental premitting laws were **not** identified as preserved.

These comments reflect Congress' intent to preempt state regulation of rail transportation to the maximum extent possible, pushing up to the edge of powers constitutionally reserved to the states that cannot be preempted, in any way, even under the power of the Commerce Clause. Although a state possesses police powers to adopt laws to secure generally the comfort, safety, health and prosperity of its citizens, the Constitution restricts such powers, including the power to regulate environmental or safety concerns, to those that do not interfere with Congress' exclusive authority to regulate interstate commerce under the Commerce Clause. *See, e.g., Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978) (holding unconstitutional a state law banning from state highways trucks longer than 55 feet); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (holding unconstitutional a

state law prohibiting trains more than 14 passenger cars or 70 freight cars in length from operating in Arizona). Moreover, under the authority of the Commerce Clause, Congress has the power to preempt state regulations, even those based on environmental or safety concerns, if Congress determines they have the effect of burdening interstate commerce.

As reflected in the legislative history of the ICCTA, Congress intended to preempt *all* state regulation of rail transportation to the maximum permissible extent. Again, the issue here is the effect of the permit process at issue. If the permit process has the potential to deny or impede rail transportation, which is exclusively regulated by the federal government, such regulation is preempted. Congress clearly did not mean, as Auburn argues, to reserve to the states comprehensive regulatory powers over the environmental consequences of rail transportation, including the power to veto or condition federally-licensed activities through a permit process. While the states retain certain police powers to address certain local health and safety concerns *created* as a consequence of rail transportation,[5] it is equally clear that the states lack the power to regulate rail transportation

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[5] Local regulation of railroad safety is permitted only to reduce or eliminate an essentially local safety hazard, and only when the Secretary of Transportation has not acted, and the regulation is not inconsistent with federal authority and does not unreasonably burden interstate commerce. 49 U.S.C. § 20106; *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993)

directly based on these concerns. A state does not have the power to condition the performance of a federally-licensed activity, like the construction of an airport runway or the upgrading of an interstate rail line, on the state's prior approval. *See Burbank-Glendale-Pasadena Airport Authority*, 979 F.2d at 1341. Such conditioning is a "direct interference" with the movement and operation of such transportation and is thus preempted by federal law. *See id.*

The limited references in the legislative history to preemption of "economic" regulation does not constitute compelling evidence of congressional intent to limit the preemptive effect of the ICCTA especially in face of the plain language of the Act and its statutory framework. To the contrary, the plain language of the Act, its statutory framework, as well as legislative history compel the conclusion that Congress sought to preempt state and local regulation of railroad operations to the greatest extent possible. Such a broad reach is not tantamount to preempting all state and local police powers. But that reach does include preemption of state environmental permitting regulations where the effect of the permitting process would be to deny or impede railroad operations.

5. The decision of the Ninth Circuit does not preempt federal environmental laws.

Auburn attempts to create an ambiguity in the ICCTA that does not exist. Specifically, Auburn argues that the Ninth Circuit's plain reading of the statute undermines the application of federal environmental laws to railroad operations which is contrary to the

position of the STB. There is no contradiction. No one has argued, and the Ninth Circuit did not hold, that the ICCTA preempted application of NEPA and like federal laws to the exercise of the STB's jurisdiction. Congressional intent to place exclusive jurisdiction in the hands of the STB does not in any way undermine the obligation of the STB to follow federal environmental laws such as the National Environmental Policy Act [42 U.S.C. §4321] in exercising its exclusive jurisdiction. Of course, that is exactly what happened here as the STB conducted environmental review under NEPA of BNSF's acquisition of the Washington Central line (the eastern portion of the stampede pass line). The Ninth Circuit reviewed the STB's environmental review and concluded: "the STB conducted a thorough, independent investigation of the environmental consequences of the Stampede Pass line reopening as mandated by law." *Auburn*, 154 F.3d at 1032.

6. The Ninth Circuit decision does not establish railroads as sovereigns.

Auburn next creates hypotheticals not at issue in this case, applies the Ninth Circuit's decision to those hypotheticals, and argues that the result would be unwarranted environmental risks or harm. The Ninth Circuit's decision does not suggest nor would permit the hypothetical results that worry Auburn. The issue before the Ninth Circuit in this case was whether state and local regulation in the form of **permitting** decisions that had the potential to bar or substantially interfere with railroad operations and construction was preempted by

the express language of the ICCTA. The Ninth Circuit answered "Yes." The Ninth Circuit did not hold that railroads had absolute immunity for the environmental consequences of their actions; the Ninth Circuit did not even address such a question.

The STB, on the other hand, did address this question (both in its Response to Auburn's Petition and in its decision below) and allayed the fears Auburn now expresses. The STB found that the ICCTA would not preempt a state law prohibiting a railroad from dumping waste into waterways or imposing damages liability for destruction of natural resources. The ICCTA preempts state and local regulation of railroad construction and operations that have the potential effect to impede such activity. The ICCTA does not preempt state law imposing, for example, damages for tortious activity resulting in environmental harm. Such state law remedies do not impede or halt railroad activity and are not prohibited by this decision.

Certainly, the Ninth Circuit's conclusion that state and local permitting of railroad operations is preempted by the ICCTA will have some application beyond BNSF's reopening of the Stampede Pass line. But the mere fact that a case may have broad implications does not mean that a court should address the application of its decision to factual scenarios not before it. Those scenarios are the subject of future disputes where the law of this case will be applied to specific facts on a case-by-case basis. Short-cutting this normal process of development of case decisional law is not appropriate and is not a reason to grant certiorari.

Auburn's concern about the potential traffic impacts of a possible new BNSF intermodal facility in Auburn is a perfect example of why granting the petition based on hypothetical scenarios is inappropriate. BNSF currently has no plans to construct a new or expanded intermodal facility at the current rail yard in Auburn. If a facility is proposed by BNSF in the future, it is unknown what impacts would result. Auburn can only speculate on possible impacts that would concern the City. There simply are no facts and no controversy at issue that any court could decide now.

CONCLUSION

Auburn's petition for certiorari does not involve a conflict between any court or an issue of sufficient substance to merit review by this Court. Auburn's arguments were fully considered and rejected without a single dissenting voice by the STB and Ninth Circuit. Moreover, the Ninth Circuit's decision does not grant railroads the power "to take unfettered action." Railroads are still subject to federal oversight including environmental review and are still subject to state remedies for the environmental consequences of their acts as long as the remedy is not in a form that can shut down or impede operations. The Ninth Circuit's decision is entirely consistent with prior court decisions interpreting the ICCTA, its predecessor, and other broadly preemptive federal laws. Auburn's petition for certiorari should be denied.

RESPECTFULLY SUBMITTED this 20th day of April, 1999.

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